



December 21, 2009

Jennifer J. Johnson, Secretary  
Board of Governors of the Federal Reserve System  
20th Street and Constitution Avenue, N.W.

Facsimile: (202) 452-3819

Re: Federal Reserve System [Regulation E; Docket No. R-1377]

Dear Ladies and Gentlemen:

This letter is submitted on behalf of Visa Inc. ("Visa") in response to the proposed rule to implement Title IV of the Credit Card Accountability Responsibility and Disclosure Act of 2009<sup>1</sup> (the "CARD Act") under certain amendments to Regulation E,<sup>2</sup> which implements the Electronic Funds Transfer Act (the "EFTA"). The proposed gift card rule was published in the Federal Register on November 20, 2009 at 74 Fed. Reg. 60,985 and is applicable to gift certificates, store gift cards, and certain general-use prepaid cards (collectively, "Gift Cards"). Throughout the balance of this comment letter, we refer to Title IV of the CARD Act as the "Gift Card Act," and the proposed rules as the "Proposed Gift Card Rules."

Visa is the world's largest retail electronic payment network, providing assurance of acceptance at more than 29 million merchant outlets and 1.5 million ATMs in more than 200 countries and territories worldwide. Network branded gift cards are part of the prepaid card segment, the fastest growing category of card payments in the U.S., which serves the needs of consumers, businesses and government with a flexible non-credit tool for efficient, secure and convenient payments.

Visa would like to thank the Board of Governors of the Federal Reserve System (the "Board") for the opportunity to comment on the Proposed Gift Card Rules. Visa supports the key goals of the Gift Card Act including enhanced disclosure and other requirements that can benefit consumers and continue to drive greater choice, product features, and innovation in the vibrant and emerging prepaid card industry. As set forth below, Visa believes that certain of the Proposed Gift Card Rules require clarification to better implement the purposes of the Act including greater transparency and choice for consumers. In addition, the Board specifically invited comment on some options for the Proposed Gift Card Rules, which we also address. We focus our commentary below on the following portions of the Proposed Gift Card Rules: (A) the

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<sup>1</sup> Pub. L. 111-24, 123 Stat. 1734 (2009).

<sup>2</sup> 12 C.F.R. Part 205.

definition of “service fees;” (B) the definition of “activity;” (C) the characterization of the temporary non-reloadable card issued prior to a personalized general purpose reloadable card; (D) transition period; (E) required disclosures on loyalty, award, or promotional program gift cards; (F) Alternative A for Section 205.20(e)(1); (G) preemption with respect to state unclaimed property statutes; and (H) retroactive application of the Proposed Gift Card Rules. We also propose some technical clarifications.

## **I. Visa’s Principal Comments**

- A. By not giving reasonable effect to the word “periodic” in the definition of “service fees,” the commentary to the Proposed Gift Card Rules creates an inherent conflict in the Gift Card Act, inappropriately expands the Act’s restrictions on fees, and creates unworkable disclosure obligations on the Gift Card itself.

One of the principal prohibitions in the Gift Card Act is that no dormancy, inactivity, or service fee may be charged to a Gift Card until after a twelve-month period of inactivity.<sup>3</sup> The Gift Card Act defines “service fee” as “a periodic fee, charge, or penalty for holding or use of a gift certificate, store gift card, or general-use prepaid card” (emphasis added) and expressly excludes “a one-time initial issuance fee.”<sup>4</sup> While the Proposed Gift Card Rules adopted equivalent language defining a service fee as a “periodic fee” for holding or use of a Gift Card<sup>5</sup> in proposed official comment 20(a)(6)-1, the Board interprets the term service fee as encompassing any fee that may be imposed “from time to time” for holding or using the Gift Card including “a monthly maintenance fee, a transaction fee, a reload fee, or a balance inquiry fee.” The Board therefore includes not only truly periodic fees imposed at regular intervals for “holding or use” of the card such as a monthly maintenance fee, but also activity-based fees that arise from cardholder-initiated transactions. This interpretation creates an inherent inconsistency in the Gift Card Act, risks adverse impacts on consumers, innovation, and competition, significantly complicates the Gift Card disclosure requirements and, ultimately, fails to give due effect to the qualifier “periodic.” Clarifying that the restriction on service fees applies only to “periodic” fee – i.e., regularly imposed, non-activity-based charges – would support a more consistent and reasonable interpretation of the Act as a whole.

The Board’s interpretation of service fees creates an inherent tension with application of the term “inactivity.” The Act permits a dormancy, inactivity, or service fee only after a twelve month periodic of inactivity,<sup>6</sup> and the Proposed Gift Card Rules provide that this twelve month clock re-starts after any new activity.<sup>7</sup> By including fees generated by cardholder-initiated

<sup>3</sup> Pub. L. 111-24, § 401, 123 Stat. 1734, 1752-1753. Visa refers to the period after the twelve months of inactivity as the “Inactive Period.” Conversely, Visa refers to the period in which a Gift Card is being used as well as the twelve-month waiting period as the “Active Period.”

<sup>4</sup> Pub. L. 111-24, § 401, 123 Stat. 1734, 1752.

<sup>5</sup> 74 Fed. Reg. 60,991 (Nov. 20, 2009).

<sup>6</sup> Pub. L. 111-24, § 401, 123 Stat. 1734, 1752 - 1753.

<sup>7</sup> 74 Fed. Reg. 61,011

activity in the definition of service fees, the commentary creates an irreconcilable dichotomy in which an *activity*-based fee such as a reload fee may only be imposed during the *Inactive Period*. Logically, that situation can never occur, and the commentary therefore improperly renders the reference to service fees in the statute superfluous, effectively banning all transaction-based fees.

The policy impact of effectively prohibiting any type of transaction or activity-based fees – even where such fees are clearly and conspicuously disclosed – will be to stifle competition, limit the availability of value-added services and transactions that many consumers may desire, and increase the fees that will be paid by more cardholders. Visa supports the policy that any fees should be clearly disclosed, and that competition will ultimately drive down fees even for value-added services.<sup>8</sup> But without the ability to charge any transaction-related fees for unique or costly services selected by the consumer, issuers will have little incentive to improve or offer broad Gift Card functionality, and may in fact reduce such functionality. For example, the Board suggests that a “foreign currency fee” is the type of service fee that cannot be charged during the Active Period.<sup>9</sup> Because offering currency conversion services has a cost to issuers, they may simply restrict usage of Gift Cards outside the United States. This would deprive a cardholder of a feature that he or she may indeed value – a low-cost, efficient alternative for converting currency in a foreign country – even if there is a fee associated with that transaction. Also, if an issuer does not have the ability to charge any transaction-related fees for unique or costly services, then many issuers will likely start charging all consumers initial issuance fees or they may raise such fees. However, if the Board revised its proposed commentary on service fees so that it was in line with Congressional intent, then only those cardholders who utilized the unique or costly services would be charged fees related to those services.

Moreover, the Board’s interpretation fails to give reasonable effect to the language of the Gift Card Act. A standard definition of “periodic” is “[c]haracterized by periods; occurring at regular intervals.”<sup>10</sup> In contrast, transaction fees, reload fees, balance inquiry fees and foreign currency transaction fees are only imposed if and when the cardholder chooses to initiate such transactions. Congress more likely intended to be consistent with the language found in the marketplace and in State laws, which generally refer to service or maintenance fees as those imposed regularly on the basis that the cardholder is merely holding or using the card during that period, rather than upon initiating a specific transaction or activity. This common usage can be found in terms and conditions of gift card issuers, and in many State gift card statutes, where “service” or “maintenance” fees are typically distinguished from activity-based fees. Excerpts of illustrative terms and conditions, and State gift card laws, are attached hereto as Exhibit A and Exhibit B, respectively. Although the Gift Card Act expressly excludes one-time initial issuance fees,<sup>11</sup> a better reading is that this exclusion was included for clarity to confirm that such fees were not prohibited, rather than to exhaustively define permitted activity-based fees. And while

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<sup>8</sup> We note that Visa does not issue cards to consumers, or set any cardholder fees. Setting such fees is in the sole discretion of each Gift Card issuer. Visa’s interest as a payments network in clarifying the definition of service fees is to support greater card issuance and usage through clear and accurate disclosure and consumer choice, including by ensuring the commercial ability of issuers to offer innovations, transaction options, and value-added services.

<sup>9</sup> 74 Fed. Reg. 60,991.

<sup>10</sup> Webster’s Third New Dictionary (1988).

<sup>11</sup> Pub. L. 111-24, § 401, 123 Stat. 1734, 1752.



the Board expressed a concern in its commentary that issuers might try to evade the restrictions on periodic service fees,<sup>12</sup> if abusive practices arise the Board has additional tools under the EFTA and the Gift Card Act to address specific non-compliant practices.

Finally, the broad interpretation of “service fees” would complicate the Gift Card disclosure requirements so significantly as to make them unworkable and inherently confusing. The Proposed Gift Card Rules require numerous disclosures be on the Gift Card plastic, some of which must be disclosed in a clear and conspicuous manner and others which must be disclosed with equal prominence and in close proximity to the card’s expiration date.<sup>13</sup> Of course, these disclosures are in addition to other disclosures required on the Gift Cards pursuant to the rules of the card networks, the requirements of other federal or state banking agencies, or to assist consumers in the use of their Gift Cards. Such disclosures may include the network brand (e.g. Visa), the issuer’s name (e.g. Wells Fargo), characteristics of the Gift Card (e.g. whether it is reloadable or not), and FDIC insurance coverage (or lack thereof). For an example of the difficulties with printing these required disclosures on the card plastic itself where “service fees” are broadly interpreted, please see the Gift Card mock-up attached as Exhibit C. If the Board redefines service fees in line with Congressional intent and adopts Visa’s position with respect to Alternative A on Section 205.20(e)(1), see section F below, then the disclosures required on the Gift Cards themselves likely become feasible.<sup>14</sup>

Had Congress intended to apply the prohibition to activity-based fees, it could easily have done so by utilizing broader language and by omitting the term “periodic.” Given its harmful and significant impact on existing and potential Gift Card products, such a sweeping prohibition would have been featured far more prominently in the Act as the express intent of Congress, rather than depending upon an overly expansive interpretive comment from the Board, or the resulting impracticality of the disclosure requirements. The more appropriate and consistent reading of the Gift Card Act is to give reasonable effect to the qualifier “periodic,” so that the term service fees refers to the imposition of a monthly or otherwise recurring maintenance fee that automatically decrements the value available for the consumer to spend – basically, a fee analogous to a periodic “inactivity or dormancy” fee but which is imposed even when the cardholder is using the card on an active basis.

B. The Board should further delineate actions that constitute “activity.”

As noted, a Gift Card must experience a twelve month period of “inactivity” before a dormancy, inactivity, or service fee may be charged.<sup>15</sup> Understanding what constitutes “activity” under the Act is therefore important in determining (a) when an issuer can start the clock on the twelve month inactivity period, and (b) when the Gift Card reverts back to the Active Period because of cardholder action. Visa therefore proposes the following chart to expand on

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<sup>12</sup> 74 Fed. Reg. 60,991.

<sup>13</sup> 74 Fed. Reg. 60,999-61,001; 61,006-07.

<sup>14</sup> If the Board retains the proposed definition of “service fees” then the “on the card” disclosure requirements in the Proposed Gift Card Rules will likely foreclose the further innovation of new form factors (e.g. fobs, mobile, etc...).

<sup>15</sup> Pub. L. 111-24, § 401, 123 Stat. 1734, 1752-1753.

examples provided by the Board in the Proposed Gift Card Rules to distinguish between actions constituting or not constituting activity:

<u>Constitutes Activity</u>	<u>Not Activity</u>
Initial Load of Gift Card*	Balance Inquiry**
Reload of Gift Card*	ATM Balance Inquiry
Authorized ATM Withdrawal Transaction	Request for Paper Statement
Online Bill Pay Transaction	Request for Secondary Cards
Request for Paper Check bill-pay	Request for Replacement of Lost, Stolen, Expired Card**
Authorized POS Transaction	Imposition of Dormancy, Inactivity, or Service Fees**
Credit Transfer to another Cardholder	POS or ATM Transaction which fails authorization or is unauthorized
	Cardholder call to Live Customer Service or IVR
	Research and documentation request by cardholder
	Sending or receiving a text message
	Credit transaction resulting from merchandise return or merchant dispute

\* The Board classified these items as “activity” in the Proposed Gift Card Rules. 74 Fed. Reg. 61,011.

\*\* The Board classified these items as not constituting “activity” in the Proposed Gift Card Rules. 74 Fed. Reg. 61,011.

C. The temporary non-reloadable card issued prior to a personalized general purpose reloadable card should be excluded from the Gift Card Act.

The Board’s concerns with respect to the temporary non-reloadable cards issued prior to the receipt of a personalized general purpose reloadable card (“Starter Card”) are, of course, valid but only for those Starter Cards which do not have reload capability.<sup>16</sup> It is Visa’s understanding, after discussion with a number of Visa prepaid issuers, that certain of the Visa Starter Cards in the marketplace must be registered with the issuer prior to being activated. Once a Starter Card is registered (i.e. the issuer applies Know Your Customer procedures) the Starter Card is activated and may then be used for purchases and reloads. Hence, for these Starter Cards which may be reloaded after activation, the Starter Card is “reloadable but not labeled or marketed as a gift card.” To differentiate these cards, the Board might require additional disclosures for these Starter Cards on the packaging such as the words “reloadable” or “temporary reloadable.”

<sup>16</sup> 74 Fed. Reg. 60,993-60,994.

For those Starter Cards which are not reloadable either prior to, or after, activation the Board should likewise treat these Starter Cards as excluded from the Gift Card Act. To do otherwise will result in substantial consumer confusion with respect to 100 percent of these personalized general purpose reloadable cards, to address the theoretical confusion for those cards which are not reloadable after activation. As the following illustration of the consumer experience shows, any consumer benefit derived from characterizing this set of Starter Cards as non-excluded general-use prepaid cards would be greatly outweighed by the broader, substantial consumer confusion caused by this approach.

First, the consumer would proceed to a prepaid card display in a retail location with applicable signage indicating that all prepaid cards in the display are reloadable (pursuant to the Board's comments in the Proposed Gift Card Rule reloadable cards could not be marketed in the same display as Gift Cards). Second, the consumer would purchase a card with packaging clearly indicating that the card is reloadable. Then, notwithstanding that the consumer purchased a reloadable card from the reloadable card section in the display, the initial card would contain the mandated Gift Card Act disclosures and restrictions on the card and in the terms and conditions. After the consumer registered the temporary "Gift Card" he or she would subsequently receive a personalized, reloadable "non-Gift" card, which would have an entirely different set of terms and conditions and fee structure.

Another option with respect to the Starter Cards which are not reloadable after activation may be to provide two sets of disclosures up front. Even if there was an efficient way to do this given card space and packaging limitations – which we doubt – it would be inherently confusing.

- D. There should be a twelve-month transition period after August 22, 2010 for those Gift Cards in distribution at that time.

If the Board were to require all Gift Cards sold after August 22, 2010 to be in compliance with the disclosure obligations and fee prohibitions, all issuers and program managers would have six months from the date of the final rules to (a) design new Gift Cards, packaging, and terms and conditions; (b) print such Gift Cards, packaging, and terms and conditions; (c) remove existing card stock from the distribution centers and retail stores; and (d) distribute new card stock to the distribution centers and retail locations.

In addition to the substantial waste and expense, there is a critical issue of capacity. If all issuers and program managers were required to completely replace their card stock between February 22, 2010 and August 22, 2010 then they would all generally be following the same time line, meaning that millions of cards, card packages, and terms and conditions would need to be reprinted during the same two to three week period in 2010 and all of those cards would likewise need to be stocked during a subsequent two to three week period in 2010. This 180 day timeline is unrealistic given the limited number of card printing facilities, and limited number of stock agents, in the United States.

- E. The disclosures in proposed Section 205.20(d)(2) and (e)(3) should not be required to be stated on the Loyalty, Award, or Promotional Gift Cards themselves.

The two principal obligations set forth in the Gift Card Act are (a) fee disclosures, and (b) fee prohibitions.<sup>17</sup> Pursuant to new EFTA Section 915(a)(2)(D)(iii), Congress excluded Loyalty, Award, or Promotional Gift Cards (“LAP Cards”) from these two obligations. By requiring the same disclosures on LAP Cards and on Gift Cards the Board is expressly going against Congress’ intent to exclude LAP Cards completely (not in part) from the Gift Card Act. Equally important, requiring disclosures on such LAP Cards that are identical to those on the Gift Cards will lead to substantial consumer confusion since it is less likely consumers will be able to easily differentiate these prepaid products, thus undermining one of the principal purposes of the Gift Card Act. Moreover, to the extent the Board fails to clarify its interpretation of service fees, and mandates that LAP Cards contain the same disclosure as Gift Cards on the card plastic itself, this would impose on LAP Cards disclosure burdens that would effectively undermine the ability of issuers to offer, and charge fees for, enhancements and value-added services. Visa, however, would support required disclosures if limited to the terms and conditions accompanying these LAP Cards, rather than the card plastic.

- F. Visa supports Alternative A for Section 205.20(e)(1), but proposes that the disclosures required on the Gift Card in proposed Section 205.20(e)(3) related to the separate expiration of funds be removed as there would no longer be a need to distinguish between the expiration date of the plastic and the expiration date of the underlying funds.

Under Alternative A of Section 205.20(e)(1), the Board would not allow the purchase of a Gift Card unless the card plastic expiration date is at least five years after the date the Gift Card is sold or issued to a consumer.<sup>18</sup> If the Gift Card plastic were required to have at least a five-year expiration date at the time of purchase and activation that would significantly simplify Section 205.20(e) which could then read as follows:

Section 205.20

...

(e) Prohibition on sale of gift certificates or cards with expiration dates.

No person may sell or issue a gift certificate, store gift card, or general-use prepaid card with an expiration date, unless:

(1) The certificate or card expiration date, if any, is at least five years after the date the certificate or card was sold or issued to a consumer;

(2) The expiration date for the underlying funds is at least the later of:

(i) Five years after the date the gift certificate was issued, or five years after the date on which funds were last loaded to a store gift card or general-use prepaid card; or

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<sup>17</sup> Pub. L. 111-24, § 401, 123 Stat. 1734, 1752-1753.

<sup>18</sup> 74 Fed. Reg. 60,998.

(ii) The certificate or card expiration date, if any; and

(3) No fee or charge is imposed on the cardholder for replacing the gift certificate, store gift card, or general-use prepaid card prior to the funds expiration date, unless such certificate or card has been lost or stolen.

The “clear and conspicuous” disclosure obligation set forth in new EFTA Section 915(b)(3)(A) could likewise be met by requiring that the “valid thru” verbiage on the front of the Gift Card be changed to read “Expiration Date.” By requiring the card plastic to have an expiration date at least five years after the date the Gift Card was sold or issued to the consumer and changing the “valid thru” verbiage on the front of the card to read “Expiration Date,” the Board could both ensure compliance with new EFTA Section 915(b)(3)(A) and significantly lessen the likelihood of consumer confusion.<sup>19</sup>

Notwithstanding the above, if the Board decides that a transition period after August 22, 2010 is not appropriate, then Visa would support the imposition of Alternative B followed by a subsequent transition to Alternative A after the passage of an appropriate period of time.

G. The Board needs to make a determination about whether the Gift Card Act preempts certain state unclaimed property statutes.

Section 205.12(b)(1) of Regulation E, as amended by the Proposed Gift Card Rules, reads as follows:

The Board shall determine, upon its own motion or upon the request of a state, financial institution, or other interested party, whether the act and this regulation preempt state law relating to electronic fund transfers [, or to dormancy, inactivity, or expiration dates, of gift certificates, store gift cards, or general-use prepaid cards.] Only state laws that are inconsistent with the act and this regulation are preempted and then only to the extent of the inconsistency. A state law is not inconsistent with the act and this regulation if it is more protective of consumers.

There is a clear and direct conflict between certain state unclaimed property laws which require remittance of unclaimed funds three years after abandonment to the state of the cardholder and new EFTA Section 915(c)(2), as implemented by proposed Section 205.20(e) of the Proposed Gift Card Rules. The state unclaimed property statutes require a holder of consumer funds, who might otherwise hold onto funds abandoned by the consumer forever, to remit such funds to the consumer’s state of residence so that the state may “hold” the funds until claimed by the consumer. If the Board does not determine that the three year remittance periods in certain state unclaimed property laws are preempted by the Gift Card Act, that will (a) create significant operational challenges for issuers with no benefit to consumers, and (b) convert the issuers into

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<sup>19</sup> If the underlying funds do not expire, which is the case today for a number of Gift Card Programs, that fact may simply be disclosed in the terms and conditions accompanying the Gift Cards as is done today. For reloadable Gift Cards it may be appropriate to retain the proposed Section 205.20(e) as currently drafted given the fact that the expiration date on those cards may be indefinite if the cardholder continues to reload his or her Gift Card.



creditors for the States that hold the unclaimed funds in years three through five as the issuer has to allow consumers immediate use of such funds notwithstanding the fact that those funds are really owed by the state to the consumer.

H. The Board should confirm that the Gift Card Act does not apply to those Gift Cards purchased by consumers prior to August 22, 2010.

The Proposed Gift Card Rules should only apply to those Gift Cards purchased on or after August 22, 2010 for three reasons. First, consumers who purchased Gift Cards prior that date did so with the full knowledge of the terms and conditions applicable to such Gift Cards. Second, the task of informing those consumers of new terms and conditions would be for all practical purposes impossible. The vast majority of these Gift Cards are non-personalized and therefore there is neither an address to which an issuer could mail an amended terms and conditions nor an email address or phone number for reaching the cardholder. Third, to retroactively apply the Gift Card Act to those Gift Cards sold prior to August 22, 2010 would impose a substantial economic hardship on those issuers or program managers who priced and sold their Gift Cards based on certain assumptions about usage and associated fee revenue.

## **II. Clarifications Requested by Visa**

The following Visa comments are generally of a more technical or clarifying nature. The Board's incorporation of these comments will assist the industry as it moves forward implementing the Proposed Gift Card Rules.

A. Proposed Official Comment 20(a)(4) – Loyalty, Award, or Promotional Gift Card.

In proposed official comment 20(a)(4), the Board sets forth several examples of cards that the Board would consider LAP Cards.<sup>20</sup> There are, however, no examples of cards which may be redeemed solely for a particular good. For example, a manufacturer may send a consumer a prepaid card that is solely redeemable for a specific product (e.g. a prepaid card that may only be redeemed for a package of ten Bic pens). The Board should include such an example in proposed official comment 20(a)(4) as being illustrative of a LAP Card.<sup>21</sup> Another example of a LAP Card to include in this commentary would be a prepaid card that a consumer receives when he or she redeems points earned via the use of the issuer's credit card. Both examples above fall squarely into the LAP Card exclusion.

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<sup>20</sup> 74 Fed. Reg. 61,008.

<sup>21</sup> Alternatively, the Board may include such an example as a card that is neither a store gift card nor a general-use prepaid card as these are not cards "[i]ssued to a consumer in a specified amount." (See Section 205.20(1)(i) and (2)(i).)

**B. Proposed Official Comment 20(b)(2) – Reloadable but not marketed or labeled as a gift card or gift certificate.**

Visa has two comments to the Board’s proposed official comment 20(b)(2):<sup>22</sup>

1. The Board, in proposed official comment 20(b)(2), provides the following guidance on the meaning of reloadable: “Reloadable. A card, code, or other device is ‘reloadable’ if it has the capability of having more funds added by a cardholder after the initial purchase or issuance.”<sup>23</sup> We assume that the Board intended that whether a card is reloadable should be determined by reference to the marketing materials and the terms and conditions between the issuer and the cardholder, rather than any potential “back end” technical ability of an issuer to add value to the card.

2. In proposed official comment 20(b)(2), the Board defines the phrase “marketed or labeled as a gift card or gift certificate” as “directly or indirectly offering, advertising or otherwise suggesting the potential use of a card ... as a gift for another person.”<sup>24</sup> The Board also proposes a safe harbor where a reloadable card will not be deemed “marketed or labeled as a gift card or gift certificate” if entities maintain policies and procedures reasonably designed to avoid such marketing.<sup>25</sup> The Board provides one example where the terms of the safe harbor are satisfied and one example where the terms of the safe harbor are not met.<sup>26</sup> However, the first and second examples leave open the question of whether it is permissible for cards that are “reloadable and not marketed or labeled as a gift cards” to be included in the same promotional display with Gift Cards if the promotional display does not have a sign stating “Gift Cards” appearing prominently at the top of the display. Visa is of the view that such placement should be permissible. Visa also welcomes any further clarity the Board can provide with respect to acceptable retail display practices that would satisfy the exemption for cards which are reloadable and not marketed or labeled as a gift card. For example, Visa believes it should be acceptable to include such cards in displays with “Gift Card Mall” at the top of the display so long as there is a separate section within this display that is clearly labeled “Reloadable Cards.”

**C. Proposed Official Comment 20(b)(4) – Not Marketed to the General Public.**

Visa has two comments to the Board’s proposed official comment 20(b)(4):

1. The following example of a Gift Card that the Board would deem “marketed to the general public” and thus subject to the Gift Card Act is included in proposed official comment 20(b)(4):<sup>27</sup>

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<sup>22</sup> 74 Fed. Reg. 61,008.

<sup>23</sup> 74 Fed. Reg. 61,008.

<sup>24</sup> 74 Fed. Reg. 61,008.

<sup>25</sup> 74 Fed. Reg. 61,009.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

An issuer of prepaid cards advertises a reloadable gift card to teenagers and their parents promoting the card for use by teenagers for occasional expenses, school books and emergencies and by parents to monitor spending. Because the card is marketed to and may be sold to any member of the general public, the exclusion in Section 205.20(b)(4) does not apply.

The word “gift” should be inserted between “reloadable” and “card” in the first sentence. In Visa’s view the addition of the word “gift” above clarifies the characteristics of the underlying card and corrects the hypothetical.

2. The Board states that “[a] card ... is marketed to the general public if the potential use of the card ... is directly or indirectly offered, advertised, or otherwise promoted to the general public.”<sup>28</sup> The definition of “marketed to the general public” in the Proposed Gift Card Rules should be modified to read as follows:

A card ... is marketed to the general public if the potential use of the card ... is directly or indirectly offered, advertised, or otherwise promoted for sale to the general public.

If the concept of “for sale” is not incorporated into proposed official comment 20(b)(4), it will result in a substantial expansion of the scope of the Gift Card Act by overly narrowing the “not marketed to the general public” exclusion. The “tax preparation company” hypothetical proffered by the Board in Example vii makes this point.<sup>29</sup> It is difficult to determine the basis for subjecting a prepaid card to the Gift Card Act simply because the tax preparation company states in an advertisement for tax refund services that the refund will be distributed on a prepaid card as opposed to a check. Generally, if the prepaid card is ancillary to the service being provided – rather than the product actually being offered for sale – then it should not be deemed as “marketed to the general public” under the Act.

D. Comment to Proposed Section 205.20(c)(1) (Alternative B).

To comply with the expiration date prohibitions in the Gift Card Act, the Board is proposing that either no Gift Card can be sold if the card expiration date is less than five years after the date the card is sold (Alternative A) or “[t]he person has policies and procedures in place to ensure that a consumer will have a reasonable opportunity to purchase a certificate or card with at least five years remaining until the certificate or card expiration date.” (Alternative B).<sup>30</sup> To the extent that Alternative B is selected over Alternative A or that Alternative B is the operative provision during a transition period, Visa is of the view that the verbiage in subpart (1) of Alternative B should be modified to read as follows:<sup>31</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> 74 Fed. Reg. 61,010.

<sup>30</sup> 74 Fed. Reg. 60,998-99 and 61,007.

<sup>31</sup> For the Board’s convenience, the verbiage above is a blackline back to the original verbiage in subpart (1) of Alternative B.

(1) The person has policies and procedures in place to ~~ensure~~<sup>so</sup> that a ~~consumer will have~~<sup>there is</sup> a reasonable ~~opportunity to purchase~~<sup>likelihood that any</sup> certificate or card ~~with~~<sup>purchased by a consumer has</sup> at least five years remaining until the certificate or card expiration date;<sup>2</sup>

### III. Additional Comment

The Board is also seeking comment on whether it should require issuers of reloadable Gift Cards to automatically issue a replacement card to consumers prior to the card expiration date of a reloadable Gift Card if the underlying funds will not expire until after the card expiration date.<sup>32</sup> Visa agrees that the Board should not mandate such automatic issuance prior to the card expiration date of the reloadable Gift Card.

### IV. Conclusion

Visa has a strong and vested interest in furthering the differentiation of the various prepaid products in the marketplace. Visa believes that consumers should be able to easily distinguish between those prepaid card products that are Gift Cards versus those that are reloadable cards or corporate-funded prepaid cards. Consumers should likewise be able to easily ascertain the fee structures applicable to the different categories of prepaid cards. Visa's comments are intended to further these goals, as reflected in the Gift Card Act.

Visa thanks the Board for its continuing efforts in implementing the Gift Card Act and for the opportunity to submit these comments to the Proposed Gift Card Rules. If you have any questions or would like to discuss any of the questions raised in this comment letter, please do not hesitate to contact me at (650) 432-1228 or [almiller@visa.com](mailto:almiller@visa.com), or our outside counsel Chris Daniel at (404) 815-2217 or [chrisdaniel@paulhastings.com](mailto:chrisdaniel@paulhastings.com).

Sincerely,



Alex Miller  
Associate General Counsel

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<sup>32</sup> 74 Fed. Reg. 60,999.



**Exhibit A**

**Existing Gift Card Terms and Conditions  
Which Contain a Service Fee**

Bank	Service Fee Provision in Cardholder Agreement
JPMorgan Chase Bank, N.A. <sup>1</sup>	You agree that the following fees, if applicable, will be charged by us and deducted from the balance on the Card  ... <b>Monthly Card Fee:</b> A \$2.50 monthly fee after the first 12 calendar months following the date of purchase.
National City Bank, N.A. <sup>2</sup>	<b>Disclosure of Charges</b> <b>PRICING SCHEDULE</b>  The following fees apply to the Card: ... Monthly Maintenance Fee *\$2.50 per month  *A Monthly Maintenance fee will begin at the start of the seventh month after the Card was issued by a National City Bank Branch. For cards that are purchased in bulk, the Monthly Maintenance fee will begin at the start of the seventh month after the Card is activated. If the Card balance is zero or becomes zero as a result of the fee, the Card will be canceled.
TD Bank, N.A. <sup>3</sup>	<b>Service Fees:</b> ... [t]here is a monthly service charge for the Card that begins on the first day of the month immediately following the 365th day after the date your Card was purchased. While you may leave Available Funds, as defined herein, on the Card, starting on the first day of the month immediately following the 365th day after the date your Card was purchased, and subject to applicable law, we will deduct a monthly service fee of \$2.50 from your Balance.
Wachovia Bank, N.A. <sup>4</sup>	Schedule of Fees and Service Charges. Bank will charge the Card for transactions and fees according to this Agreement. You agree to pay the fees and charges assessed by Bank according to this Agreement. All fees and charges will be automatically assessed against the Card, and you will be responsible for any deficiency. The following fees and charges are imposed by Bank upon the issuance and for use of the Card.  ... Monthly Service Fee (after 12 months) \$2.50

<sup>1</sup> Chase Gift Card Agreement, *available at*

<https://www.chasegiftcard.com/index.cfm?pageid=g07&CFID=1&CFTOKEN=0CF8D6BA490843E2A40D3055EF01BEA9&CFSEQ=2> (2008).

<sup>2</sup> National City Bank Visa Gift Card Agreement, *available at*

<https://giftcard.nationalcity.com/index.cfm?pageid=g07&CFID=1&CFTOKEN=B1759E495DC0653CEA8A3A30D9CCB294&CFSEQ=1&js=1> (2009).

<sup>3</sup> TD Bank Visa Gift Card Agreement, *available at*

<https://giftcard.tdbank.com/index.cfm?pageid=g07&CFID=1&CFTOKEN=5439B5204DE2330C8333BD6AC883C5E5&CFSEQ=1&js=1> (2009).

<sup>4</sup> Wachovia Gift Card Cardholder Agreement, *available at*

<https://www.visaprepaidprocessing.com/Wachovia/GiftCard/PRC312/CP312-T00-006/docs/terms.htm> (2007).

GE Money Bank <sup>5</sup>	<p><b>Fees.</b> We will charge the fees listed below for your Walmart Visa Gift Card. We can change the fees as described in section 17 below...</p> <p>Monthly Maintenance Fee beginning in the 13th month after the purchase of the Walmart Visa Gift Card      \$0.94</p>
Wells Fargo Bank, N.A. <sup>6</sup>	<p><b>MONTHLY CARD FEE :</b> After the first 12 months following activation of the card, a \$2.50 fee will be charged to your Card each month until the card expires. This fee will not be charged once the balance on the Card reaches \$0.00.</p>
MetaBank <sup>7</sup>	<p>MetaBank Fees</p> <p>There are no fees when using the Giftaccount to purchase goods and services from merchants located in the United States. The following MetaBank fees may apply and will be deducted from the balance of the Giftaccount, except where prohibited or modified by applicable law:</p> <p>...</p> <p><b>Monthly Administrative Fee*:</b> After the first 12 calendar months following the opening date of the Giftaccount, a \$2.50 fee will be deducted from the Giftaccount each month until the Giftaccount expires. This fee will not be charged once the balance on the Giftaccount reaches \$0.00.</p> <p><b>*New York customers only:</b> For Giftaccounts purchased at retail in New York or by New York residents via the Internet, no monthly service fee shall be imposed at any time prior to the thirteenth consecutive month of non-use.</p>
SunTrust Bank <sup>8</sup>	<p><b>SERVICE FEES</b> (subject to applicable law)</p> <p>You agree to pay the following service fees that apply to your use of the Card. These fees will be deducted from the remaining Card balance.</p> <p>...</p> <p><b>Monthly Maintenance Fee</b> \$2.50 This is a monthly fee that begins the 7th month after the Card is purchased.</p>
U.S. Bank, N.A. <sup>9</sup>	<p><b>Fees</b></p> <p>There are no fees when using the Gift Card to purchase goods and services. The following fees may apply and will be deducted from the balance available on the Gift Card, except where prohibited or modified by a law.</p> <p>...</p> <p><b>Monthly Fee:</b> After the first twelve calendar months following the issue date of the card, a \$2.50 fee will be charged to your Gift Card each month until the card expires. This fee will not be charged once the balance on the Gift Card reaches \$0.00. In some states this fee may not be charged until after a stated number of months of non-use.</p>

<sup>5</sup> Walmart Visa Gift Card Cardholder Agreement by GE Money Bank, available at <https://www.walmartgift.com/AcctMgmt/Controls/WalMartGiftCard/Support/CardholderAgreement.aspx> (2009).

<sup>6</sup> Wells Fargo Visa Gift Card Agreement and User Guide, available at <https://www.wellsfargo.com/giftcard/terms/> (2009).

<sup>7</sup> Metbank Simon Giftaccount Agreement, available at [https://www.simon.com/giftcard/terms\\_and\\_conditions.aspx?giftaccount=1](https://www.simon.com/giftcard/terms_and_conditions.aspx?giftaccount=1) (2007).

<sup>8</sup> SunTrust Visa Gift Card Agreement, available at <https://giftcard.suntrust.com/suntrust-web/terms.gft?reqType=terms&nav=-1>. (undated)

<sup>9</sup> U.S. Bank Visa Gift Card Agreement, available at <https://www.usbankmyaccount.com/index.cfm?pageid=g07> (2009).



## **Exhibit B**

### **Examples of State Gift Card Statutes that Distinguish Between Service Fees and other Types of Fees as well as Assign a Periodic Aspect to Service Fees**

In surveying the existing thirty-seven state gift card statutes, the term “service fees” is generally defined in those statutes more narrowly than how that term is defined in the Board’s official interpretation of Proposed Gift Card Rules. The term “service fees” is also generally defined in the state gift card statutes as a periodic monthly or annual payment for maintenance of a gift card account. For examples of those states which define service fees more narrowly either by including it as one fee among many or by direct reference to being a periodic or recurring fee for inactivity or maintenance, please see below:<sup>1</sup>

#### **A. Examples of State Gift Card Statutes which define service fees more narrowly by including it as one fee among many.**

1. **Hawaii:** HRS § 523A § 523A-3.5. Gift certificates and gift cards. (a) This chapter shall not apply to a gift certificate or gift card; provided the gift certificate or gift card has no expiration date, no expiration period, and no type of *post-sale charge or fee (including but not limited to service charges, dormancy fees, account maintenance fees, cash-out fees, replacement card fees, and activation or reactivation charges)*. (emphasis added).
2. **Illinois:** Sec. 10.6. Gift certificates and gift cards. (a) This Act [referring to the Uniform Disposition of Unclaimed Property Act] applies to a gift certificate or gift card only if: (i) the gift certificate or gift card contains or has language indicating there is an expiration date, expiration period or language indicating that there is any type of *post-sale charge or fee including but not limited to service charges, dormancy fees, account maintenance fees, cash-out fees, replacement card fees, and activation or reactivation charges*; and.... (emphasis added).
3. **Maryland:** Md. Commercial Law Code Ann. § 14-1320. Gift card (b) Disclosure of expiration or fees. -- A gift card may be subject to expiration or *a postsale fee, including a service fee, dormancy fee, account maintenance fee, cash-out fee, gift card replacement fee, activation fee, or reactivation fee*, if the following disclosures are printed clearly in a visible place on the front or back of the gift card in at least 10 point type.... (emphasis added).

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<sup>1</sup> As the definition of “service fees” in the Gift Card Act appears to be based upon the Arkansas Gift Card Statute (See section B of this Exhibit B), Visa is of the view that the definition of “service fees” in other state gift card statutes should likewise carry weight as the Board attempts to further define Congress’ intentions with respect to service fees.

4. **Michigan:** MCL § 567.235 Gift certificate, gift card, or credit memo.(2) For purposes of subsection (1), a gift certificate or gift card is considered to have been claimed or used if there is any transaction processing activity on the gift certificate or gift card including, but not limited to, redeeming, refunding, or adding value to the certificate or card. Activity initiated by the issuer of the certificate or card, including, but not limited to, *assessing inactivity fees or similar service fees*, does not constitute transaction processing activity for purposes of this subsection. (emphasis added).
5. **Pennsylvania:** 72 P.S. § 1301.1 Definitions "Qualified Gift Certificate" shall mean a gift certificate or gift card that does not contain any of the following:
  - (i) An expiration date or a period of time after which it expires.
  - (ii) Any type of *postsale charge or fee, including, but not limited to, a service charge, dormancy fee, account maintenance fee, cash-out fee, replacement card fee or activation or reactivation fee.* (emphasis added).

**B. Examples of State Gift Card Statutes which define service fees as a periodic and recurring fee.**

1. **Arkansas:** A.C.A. § 4-88-702 Definitions  
(6) "Service Fee" means a periodic fee, a charge, or a penalty for holding or use of a gift certificate, a store card, or a prepaid general use card.
2. **New York:** NY CLS Gen Bus § 396-i Acceptance of unexpired gift certificates  
5(b) *No monthly service fees* may be assessed against the balance of a gift certificate prior to the thirteenth month of dormancy. (emphasis added).
3. **North Dakota:** N.D. Cent. Code, 51-29-02. Expiration dates -- Service fees  
A person may not charge *additional monthly or annual service or maintenance fees* on a gift certificate.... (emphasis added).
4. **Rhode Island:** R.I. Gen. Laws § 6-13-12 Sales of gift certificates  
...It shall be unlawful for any person, firm, or corporation of any kind to charge any surcharge or *additional monthly or annual service or maintenance fees* on gift certificates or to limit the time for the redemption of a gift certificate or to place an expiration date upon the gift certificate....



## Exhibit C

### Required Disclosures on Gift Card

If Issuer wanted to issue a contactless card this symbol would be required on the face of the card

If card can only be used in the US "Valid only in the US" is required. Or if the card is a flat card / unembossed "Electronic Use Only" is required. Issuers have the flexibility to put this on the front or back of the card 6-10PT Helvetica Font

NOTE: Currently, the Proposed Gift Card Rules requires this statement to be "with equal prominence and in close proximity to the card's expiration date" which means on the front of the card and in the same font size as the expiration date. This language will not fit on the front of the card without deleting the embossed name and valid thru date.  
NOTE: There is no room to put this much information, which is really necessary to avoid customer confusion. Does not allow for use on 4<sup>th</sup> line embossing which many issuers use to put the value on the card vs. up in the top right corner- \$50 Value

NON-RELOADABLE

ELECTRONIC USE ONLY

AUTHORIZED SIGNATURE NOT VALID UNLESS SIGNED

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Fees We Charge: Balance Inquiry Fee: \$1.50/call, Transaction Fee: \$1.75/transaction after 12 mos inactivity, Foreign Transaction Fee: \$2.50/transaction after 12 mos inactivity, Reload Fee: \$1.75/reload after 12 mos inactivity, Maintenance Fee: \$1.50/mo after 12 mos inactivity, Inactivity Fee: \$1.75/mo after 12 mos inactivity. For card information go to [www.website.com](http://www.website.com) or call 1-800-xxx-xxxx to obtain fee information or replace your card. Use of this card indicates acceptance of Cardholder Agreement. This card is issued by Bank XXXX, a federal bank pursuant to a license from Visa U.S.A. Inc.

PLEASE NOTE: This section is printed over the embossed items from the front of the card.

If this card allowed for cash access there might be up to 3-4 ATM network marks on the back of the card. Also if this card was a reloadable gift card NON-RELOADABLE would no longer be required, but 1-2 reload network marks would also be present

If the Gift Card is distributed by a licensed money transmitter then certain state banking departments would require verbiage similar to the following: "This Gift Card is distributed by [ ] who can be reached by calling 1(800) \_\_\_\_-\_\_\_\_."